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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENDA J. ROSS,

Defendant and Appellant.

2d Crim. No. B206490
(Super. Ct. No. 1213918)
(Santa Barbara County)

Brenda Jean Ross appeals from the judgment entered following her conviction by a jury of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1)).¹ The trial court found true allegations of four prior separate prison terms (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)(1)), and three strikes within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) The strikes consisted of two prior juvenile adjudications for robbery (§ 211) and one prior adult conviction for the same offense. The court struck the enhancements for the four prior separate prison terms. It sentenced appellant to prison for 30 years to life.

¹ All statutory references are to the Penal Code.

Appellant contends that the evidence is insufficient to support one of the two theories of guilt presented by the prosecution to the jury. In addition, appellant contends that (1) the trial court committed prejudicial error by failing to instruct the jury on the knowledge element of assault with a deadly weapon, and (2) the trial court violated her constitutional rights by treating the two prior juvenile adjudications as strikes. We affirm.

Facts

The victim, Tonja Hilliker, testified as follows: During an argument, appellant punched Hilliker in the face and other parts of her body. Hilliker fought back and hit appellant "a couple of times." Appellant pulled out a folding knife from her purse and threatened to kill Hilliker. The blade of the knife was extended. Appellant tried to stab Hilliker "around" her face and stomach. The blade missed Hilliker's stomach by only about four inches. Appellant did not stab Hilliker, but she struck her with the butt of the knife in the scalp area just above her forehead.

Jesus Lemos testified that he saw appellant hit Hilliker once or twice with the knife when it was "in the closed position without a blade." However, shortly after the incident Lemos told the police that "[h]e couldn't recall whether the knife was open or closed." Lemos further told the police that appellant "took a knife out from her waistband and began to hit Miss Hilliker with it."

The blow to Hilliker's head with the butt of the knife caused a deep, half-inch to one-inch-long "contusion abrasion" that bled. The abrasion did not require stitches.

Sufficiency of the Evidence

During closing argument, the prosecution presented its case to the jury on alternate theories of guilt. One theory was that appellant had committed an assault with a deadly weapon when she attempted to stab Hilliker with the knife. The other theory was that appellant had committed the offense when she struck Hilliker in the

head with the butt of the knife.² Appellant concedes that the former theory was "legally correct" and "would support a conviction" of assault with a deadly weapon." On the other hand, appellant argues that the latter theory was legally incorrect "because there was no substantial evidence that [she] used the knife butt in a manner likely to cause death or great bodily injury."

Relying on *People v. Green* (1980) 27 Cal.3d 1, appellant contends that her conviction must be reversed because "the record does not show upon which theory the jury relied in finding [her] guilty" The *Green* court established the following general rule: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.*, at p. 69;³ see also *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1740 ["if a jury is presented with multiple theories supporting conviction on a single charge and on review one theory is found legally defective, that is, the theory does not present a legally sufficient basis for conviction, reversal is

² The prosecutor declared: "[T]here are a few separate theories upon which the prosecution relies for the first charged offense [assault with a deadly weapon], that being the fact that the Defendant took the butt of the knife when she pulled it out in the altercation and hit Miss Hilliker on the top of the head causing injury. [¶] Okay. That is one theory, or one charge related to Count 1. So, in other words, if you believe that the defendant took the butt of the knife and hit Miss Hilliker in the head the defendant can be found guilty of Count 1. [¶] If you believe the evidence that's been presented, Miss Hilliker testified that the Defendant at some point opened the knife and attempted to stab her If you believe that testimony, that's all that is needed to convict the defendant of Count 1." "The first count relates to the first incident that we have Miss Hilliker talk about with the knife. Again, the knife to head, knife trying to stab her. You have to unanimously agree on which one of those acts in order to find her guilty"

³ *Green* was overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.

required unless substantial reasons exist to find that the verdict was based on a legally valid theory"].)

Respondent argues that appellant forfeited her *Green* claim because she failed to object to the prosecutor's presentation of the allegedly legally incorrect theory. But respondent does not cite any authority requiring such an objection to preserve the issue on appeal. Accordingly, we consider the issue on its merits.

We conclude that the *Green* rule is inapplicable here because substantial evidence supports the theory that appellant committed an assault with a deadly weapon when she struck Hilliker in the head with the butt of the knife. The prosecutor, therefore, did not present a legally incorrect theory to the jury.

"[A] 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) "In determining whether an object not inherently deadly or dangerous was used in the requisite manner, the trier of fact may look to the nature of the weapon, the manner of its use, and any other relevant fact. [Citation.] Although neither physical contact nor injury is required for a conviction, if injuries result, the extent of such injuries and their location are relevant facts for consideration. [Citation.] [¶] Great bodily injury is significant or substantial injury. [Citation.] Permanent or protracted impairment, disfigurement, or loss of function, however, is not required. [Citations.]" (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086-1087.)

We " ' "must view the entire record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the [defendant] guilty beyond a reasonable doubt. In making such a determination we must view the evidence in a light most favorable to respondent and presume in support of the judgment . . . the existence of every fact the trier could reasonably deduce from the evidence." ' [Citations.]" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.)

We have examined the knife (People's Exhibit No. 6) used by appellant. A black and white copy of a color photograph of the knife (People's Exhibit No. 5) is attached to this opinion as Appendix A. The butt of the knife is constructed of metal and takes the shape of an eagle's head. The outer end of the butt is the tip of the eagle's beak. Viewing the evidence in the light most favorable to the judgment, the jury could have reasonably concluded that Hilliker was forcefully struck in the head with the tip of the beak. The jury could also have reasonably concluded that, as so used, the butt of the knife was capable of producing and likely to produce significant or substantial injury. The blow caused a deep, half-inch to one-inch-long "contusion abrasion" that bled. A police officer who came to the scene of the crime testified that blood "was coming from [Hilliker's] hairline and it was dripping down her face." Furthermore, appellant clearly intended to inflict significant or substantial injury, since she threatened to kill Hilliker and tried to stab her with the blade of the knife.

Appellant's use of the knife butt as a deadly weapon is supported by *Walls v. State of Mississippi* (Miss. Ct.App. 2002) 827 So.2d 718. In *Walls* the defendant forcefully beat the victim about the head with the butt of a knife. The knife had " 'a decorative gold metal end, containing several pointed tips. . . . ' " (*Id.*, at p. 720) A physician testified that the metal points had caused "several blunt contusions at the back of [the victim's] neck." (*Ibid.*) The court upheld the defendant's conviction of assault with a deadly weapon "[b]ecause the evidence and testimony clearly demonstrate that the butt of [the defendant's] knife was likely to cause serious bodily harm when used forcefully as a bludgeoning device" (*Id.*, at p. 721)

Instructions

In *People v. Williams* (2001) 26 Cal.4th 779, 790, our Supreme Court held that "assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." The jury instructions omitted the knowledge element. Appellant argues that this omission constituted prejudicial error.

We reject respondent's contention that appellant forfeited her claim of error because she did not object to or seek clarification of the instructions. "Instructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for appellate review. [Citations.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

The *Williams* court noted that "any instructional error [in omitting the knowledge element] is largely technical and is unlikely to affect the outcome of most assault cases, because a defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*People v. Williams, supra*, 26 Cal.4th at p. 790.) At trial, appellant's knowledge of the relevant factual circumstances was not in dispute. As set forth in appellant's closing argument, the defense theory was that appellant and Hilliker had engaged in "mutual combat" and that appellant had not attacked Hilliker with a knife. Defense counsel argued that Hilliker was not a credible witness because, at the time of the incident, she was addicted to and under the influence of crack cocaine.

Appellant contends that the instructional error was prejudicial because the jury "may have found that appellant did not have [the] requisite knowledge due to voluntary intoxication." (Capitalization omitted.) But in *Williams* our Supreme Court made it clear that voluntary intoxication cannot negate the knowledge element of assault: "In adopting this knowledge requirement, we do not disturb our previous holdings. Assault is still a general intent crime [citations], and juries should not 'consider evidence of defendant's intoxication in determining whether he committed assault' [citation]." (*People v. Williams, supra*, 26 Cal.4th at p. 788.) Thus, the trial court's failure to instruct the jury on the knowledge element was harmless beyond a reasonable doubt.

Juvenile Adjudication

Appellant argues that, because she did not have the right to a jury trial in the proceedings that resulted in the two juvenile adjudications, the trial court violated her

constitutional rights by treating the adjudications as strikes. We rejected the same argument in *People v. Pearson* (2008) 165 Cal.App.4th 740, 748. Appellant has not persuaded us that *Pearson* was wrongly decided.⁴

Disposition

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

⁴ The question of whether a juvenile adjudication can constitutionally be treated as a strike is currently before the California Supreme Court in *People v. Nguyen*, review granted October 10, 2007, S154847, and *People v. Tu*, review granted December 12, 2007, S156995.

Brian E. Hill, Judge
Superior Court County of Santa Barbara

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